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Jacob I. Corre

THINKING PROPERTY AT MEMPHIS: AN APPLICATION OF WATSON

JACOB I. CORRÉ*

Anyone familiar with Alan Watson's scholarship will take for granted the wide range of learning, the elegant expression and the analytic rightness exhibited in his contributions to this Symposium. His new analysis of some difficult problems in Roman slave law has inherent value, as does his sketch of the European intellectual history of slavery as a theoretical institution around the time that it was being entrenched as a real system in the Americas.[1] Yet it must be said that at first blush something is disturbing about the presence of Watson's work in this Symposium. Watson emphasizes the absolute evil of slavery[2] but nevertheless implicitly invites us to think about the foundations and implications of its practice in highly conceptual terms—as a lawyer's puzzle, if you will. Given the moral horror of slavery, it would be easy to decline the invitation politely and move on. Besides, what can a collection of Roman jurists and seventeenth-century natural lawyers teach us about the confrontation between law and slavery in the United States—particularly when Watson suggests that the legal systems of the American South generally avoided the complexities that "thinking property" generated in Roman law?[3]

It would be a mistake to ignore the questions raised by Watson's work as they apply to the law of slavery in the United States. In particular I want to suggest that the conceptual problems that necessarily arise in relegating a thinking agent, a human being, to the status of property also haunted the jurists charged with regulating and protecting slavery in the American South. Discovering how they handled these problems can deepen our understanding of the legal aspects of a culture that sustained and was sustained by an atrocity. The cases treated in *Thinking Property at Rome* support a thesis, which Watson has suggested elsewhere, that

* Assistant Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. I thank Julie Bentz, Anita Bernstein, Paul Finkelman, James Lindgren and Richard McAdams for their helpful comments.

1. Alan Watson, *Thinking Property at Rome*, 68 CHI.-KENT L. REV. 1355 (1993); Alan Watson, *Seventeenth-Century Jurists, Roman Law, and the Law of Slavery*, 68 CHI.-KENT L. REV. 1343 (1993) [hereinafter Watson, *Seventeenth-Century Jurists*].

2. Watson, *Seventeenth-Century Jurists*, 68 CHI.-KENT L. REV. at 1345-46.

3. Watson, *Thinking Property at Rome*, *supra* note 1 at 1371.

any slaveholding society will manifest "a continuous tension in law between the treatment of the slave as property and the recognition that he is human or at least has volition."[4] That thesis by itself, Watson notes,[5] may not tell us much, but testing it in particular legal contexts can be revealing. I will focus on the implications of the problem examined in *Thinking Property at Rome* for our understanding of United Sates slave law by examining certain aspects of the slave law of Tennessee.[6] The cases below show Watson's "continuous tension" in action at a time and place far removed from those studied in his paper.

TENNESEE 1835-1871: SOME PROBLEMS IN THE DUALISTIC CONCEPTION OF A SOUTHERN SLAVE

In the thirty years before legalized slavery ended, and for a number of years thereafter, the Supreme Court of Tennessee decided several cases that raised questions that could not be treated satisfactorily without revealing the juristic limitations of treating a slave as an ordinary chattel. More than once, the judges of that court spoke explicitly on the inadequacy of such treatment and the problems in finding an alternative conception. A vision of the owner-slave relationship grounded on principles of agency had the virtue of implying a realistic account of the slave's mental capacities, but could not accommodate the slave's lack of legal rights. A model of the relationship based on notions of property had the converse problem. It made sense of the slave's personal status in legal terms, but could not be coherently adopted in cases where the slave had exercised his rational capacities in a manner that seemed significant from a moral or legal point of view.

The cases that raised this tension most clearly dealt with the vicarious liability of a slaveowner for his slave's wrongful acts,[7] and with a free

4. Alan Watson, *Slave Law: History & Ideology*, 91 YALE L.J. 1034, 1047 (1982) (reviewing MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981)). Much the same point is made in Watson's most recent extended study of Roman slave law. ALAN WATSON, ROMAN SLAVE LAW 46 (1987) (even when the slave is treated as a thing "the human qualities of the slave will continually emerge.").

5. Watson, *supra* note 4, at 1047.

6. The slave law of Tennessee is the subject of a very fine study by Arthur Howington. ARTHUR F. HOWINGTON, WHAT SAYETH THE LAW: THE TREATMENT OF SLAVES AND FREE BLACKS IN THE STATE AND LOCAL COURTS OF TENNESSEE (1986). Howington's book deals with manumission, slaves and free blacks as criminal defendants, and white violence against slaves and free blacks; it concentrates on the procedural due process which the Tennessee courts afforded to blacks. *Id.* at iv-v. Howington does not discuss the problems and cases analyzed below. His work does show that the Tennessee courts recognized the significance of the slave's humanity in other areas of law. *Id.* at 1-3, 247-48. Howington, however, is not specifically concerned with the conceptual complexities to which this recognition gave rise.

7. I will discuss both cases involving negligence and cases involving intentional wrongdoing by the slave. The problems raised in the negligence cases relate both conceptually and functionally to

man's converting the labor of another's slave. The decisions of the Tennessee Supreme Court in these areas did not reveal an overtly pro-slaveholder bias. In fact, in most of these cases it could not have been clear that a particular outcome would benefit the class of slaveowners as a whole, much less that the case was actually decided with the best interests of slave owners. Perhaps we should not be surprised that the conceptual problems were clearest when the economic and social interests were murky. Still it cannot be said that the economic interests of the slaveowning class invariably overwhelmed the analytic difficulties generated in attempting to describe a slave in legal terms. Decisions were made that can best be understood on conceptual grounds.

Vicarious Liability of Slaveowners for Wrongs Committed by Slaves

The opinion of Justice Nathan Green in *Wright v. Weatherly* (1835)[8] expressly acknowledged the inadequacy of any legal characterization of the slave that focused solely on either the slave's legal status as property or his human capacity for agency. The facts as they are given to us were extremely simple. Wright's slave, Andrew, got into a fight with Weatherly's slave, Jerry. Andrew stabbed Jerry and Jerry died.[9] Weatherly brought an action on the case against Wright to recover Jerry's value. At trial in the circuit court for Rutherford County the court instructed the

the problem of applying the common law fellow-servant rule in the context of injured slaves: conceptually, because both depended in part on the legal character of the relationship between owner and slave; functionally, because the slave of one owner might negligently injure the slave of another owner in a work-related incident, thus raising both questions at the same time. Throughout the latter half of the nineteenth century employers were normally not liable to servants for injuries caused by fellow servants. Chief Justice Shaw of the Massachusetts Supreme Judicial Court wrote the leading opinion on this point. Farwell v. Boston and Worcester, R.R., 45 Mass. (4 Met.) 49 (1842). Paul Finkelman has shown that Southern courts consistently rejected this rule in the context of injured slaves; the owners of the slaves were allowed to sue the employer of the coworker who injured the slave on a theory of *respondeat superior* liability. Paul Finkelman, *Slaves as Fellow Servants: Ideology, Law, and Industrialization,* 31 AM. J. LEGAL HIST. 269 (1987). At least some of these cases emphasized that the slave's status as a chattel precluded application of the fellow-servant rule because a slave, as a chattel, could not be anyone's fellow-servant. *Id.* at 298-304. In contrast, I argue below that Tennessee developed a law of vicarious liability for slaveholders significant elements of which conceived the owner-slave relationship in agency terms. The apparent tension between these two conclusions merits more attention than I can give it in this Comment. For reasons discussed below I do not believe that the material interests of slaveowners can explain why different characterizations of the owner-slave relationship prevailed in different kinds of cases. It bears mentioning that no Tennessee court had occasion to decide a fellow-servant case in the slave context, although Tennessee cases between owner and hirer usually (but not always) came out in favor of the owner. *Id.* at 284 n.60. The same was not true in the cases of vicarious liability and conversion that I discuss below. For another interesting discussion of the application of fellow-servant rule to slaves (a discussion which Finkelman supersedes on critical points) see TUSHNET, *supra* note 4, at 45-49, 183-88.

8. Wright v. Weatherly, 15 Tenn. (7 Yer.) 367 (1835).

9. *Id.* at 378.

jury that a master was liable for a slave's trespass "whether the act be done when in the master's service or not, and whether with or without the master's knowledge."[10] The jury found for Weatherly and awarded him $550, its assessment of Jerry's value.[11]

Wright sought error in the Supreme Court of Tennessee and that court reversed the judgment. Justice Green's opinion is worth quoting at length:

> This court is of opinion that this action cannot be sustained. There are but two classes of cases known to the common law which have any analogy to this case. Either we must look upon the slave as occupying the same relation to the master as the servant does in England or we must regard him in the light of property only, and hold the master liable as he would be for mischief which might be committed by a vicious domestic animal. These are the analogies the common law furnishes us, and by the application of neither of these can this action be supported. To consider the slave as property only, the owner would only be liable in case he were acquainted with the vicious propensities and habits of his slave, and, with such knowledge, should permit him to run at large. That is not the case here. But it is manifest that this case has very little analogy to the case of mischief done by a slave. Although he is, by our law, property, yet he is an intelligent moral agent, capable of being a subject of government, and, like all other men, liable to answer for his own wrongs to the injured party, but for the fact that all his personal rights as a citizen, and his liabilities as such, are destroyed and merged in the ownership of the master, who controls his person, owns his property, and is entitled to the fruits of his labor.
>
> If we consider him in the light of a servant only, the master would not be liable for the injury charged in this declaration; for, in England, although a master is liable to answer for any damages arising to another from the negligence or unskilfulnes of his servant acting in his employ, yet he is not liable in trespass for the wilful act of his servant, done without the direction or assent of the master. But here, too, it is manifest, there is scarcely an analogy in the two cases. In England the servant is a free man; he is a subject of the government; he has legal rights and liabilities, and the master is only liable, in any case, because the servant is in his employ, and injuries resulting from his unskilfulness or negligence while thus employed, are, in some degree, the consequence of the master's act in employing one so unskilful or negligent. But a wilful trespass committed by the servant, without the direction or assent of the master, does not fall within the above reason, and, therefore, the servant is made to answer himself for the wrong.[12]

10. *Id.* at 367-68.

11. *Id.*

12. *Id.* at 378-80. Justice Green also authored an important testamentary manumission opinion, Ford v. Ford, 26 Tenn. (7 Hum.) 75 (1846), noted for its apparent recognition of the slave's humanity. *Id.* at 95-96. Arthur Howington has studied this case at length. Arthur F. Howington, *Not in the Condition of a Horse or an Ox: Ford v. Ford, the Law of Testamentary Manumission and*

Under either analogy, the trial court's instructions had been wrong, and the declaration failed to allege proper grounds for vicarious liability. Therefore, Green saw no reason to decide which rule to apply, and which of two equally unsatisfactory characterizations of the slave to adopt. Instead he concluded that the case was "entirely new, and one to which no principle of common law is applicable."[13] Green argued that some remedy in these cases was "loudly called for," that such a remedy would be "fair and equal among the slaveholders themselves" and that it was "imperiously required" in relation to injuries suffered by the majority of citizens, who did not hold slaves.[14] He even suggested that Tennessee at least adopt the Civil Law rule, which he said, somewhat misleadingly, was that the master was liable for the slave's wrongdoing to the extent of the slave's value.[15] But a court could achieve none of this. The relief had to come from the legislature.[16]

Although one Texas judge claimed that Green's opinion was "presented with the perspicuity, accuracy, and conciseness which characterizes the legal opinions of that learned judge,"[17] the ultimate rationale of the decision in *Wright v. Weatherly* is unclear. Two interpretations are possible. On the one hand, Green's analysis at the beginning of the opinion indicated his belief that Wright should be absolved from liability on either a proprietary or an agency theory of the relationship between

the Tennessee Courts' Recognition of the Slave's Humanity, 34 TENN. HIST. Q. 249 (1975). *See also* HOWINGTON, *supra* note 6, at iv, 2-3, 12.

13. Wright v. Weatherly, 13 Tenn. (7 Yer.) at 380 (1835).

14. *Id.*

15. *Id.* Green was evidently referring to the so-called "noxal liability" of slaveowners under Civil Law. His citation to "Cooper's Justinian 362" refers to the first edition (1812) of Thomas Cooper's translation of the *Institutes of Justinian*. (The second edition was not published until 1841.) I have not seen the first two editions of Cooper, but in the third edition (1852) the title "On Noxal Actions" (Book 4, Title 8) appears at pages 354 through 357. The principal texts in the *Institutes* on noxal liability are J. INST. 4.8.1-3. *See also* DIG. 9.4.2 (Ulpian, Ad Edictum 18).

Green's description of noxal liability was misleading. In cases of noxal liability the owner had the option of paying the damages specified by the applicable law or *surrendering the wrongdoing slave.* The slave's monetary value did not act as a cap on the owner's liability if the owner chose to pay damages. If the slave had committed a wrong with the owner's knowledge the owner was fully liable for all damages, although what would count as knowledge in this regard was a matter of some doubt. *See* DIG 9.4.2-4.

Noxal liability for the torts of a slave should not be confused with the master's general liability for a slave's contractual undertakings. As Watson notes, the master's contractual liability was limited to the slave's *peculium.* Watson, *Thinking Property at Rome, supra* n. 1 at 1356. For more detailed discussions of noxal liability see ALAN WATSON, ROMAN SLAVE LAW 68-75 (1987); WILLIAM W. BUCKLAND, THE ROMAN LAW OF SLAVERY 98-130 (1908).

16. *Id.*

17. Ingraham and Wife v. Linn, Administrator, 4 Tex. 266, 267 (1849) (Wheeler, J.). In *Ingraham,* the Supreme Court of Texas adopted the rule that the owner was not liable for intentional harms committed by his slave. The Texas court explicitly found an analogy to the common law master-servant rule appropriate, although it mentioned that Green had doubted the analogy in *Wright. Id.* at 269.

owner and slave: The absence of an allegation that Wright knew of his slave's violent tendencies would preclude liability under the property-based analogy to liability for harm done by dangerous domestic animals; the indisputable fact that the slave had committed an intentional wrong immunized the master from liability under the agency-based analogy to the common law of masters and servants. Therefore there was no need to rule as to the proper analogy and characterization of the relationship. On the other hand, Green's statements toward the end of the opinion evidence a judgment that neither the agency nor the property characterization of the owner-slave relationship could be properly applied. Since those were the only common law grounds for imposing vicarious liability, Weatherly's claim had to fail because it simply did not state a common law cause of action, even if "the injured party ought, in justice, be entitled to damages."[18] Green may have been relying on both theories, or neither.

Under either interpretation, the problem of describing the owner-slave relationship in a conceptually coherent manner loomed large in Green's opinion. However that relationship was to be described, it was not the kind that could result in vicarious liability for an unauthorized, intentional wrong by the slave. It is significant that in this case a slave-owner was bound to lose whatever the outcome. It is therefore hard to view Green's analytic hand wringing as a mere ruse to justify a decision required by the economic interests of the slave-owning class. On a global level it might be said that the decision did benefit slave owners. Under the rule no slave owner would be liable for an unauthorized, intentional wrong that his slave committed against a free person, and when slaves injured slaves there would simply be a transfer of wealth between members of the slave-owner class. Such an explanation cannot satisfactorily explain the motives behind the decision in *Wright v. Weatherly.* Paul Finkelman has demonstrated in his important study of the fellow-servant rule as applied in the context of injured slaves that Southern courts were perfectly capable of applying different rules depending on whether the injury was suffered by a slave or a free person.[19] Had the Supreme Court of Tennessee wanted only to protect slaveowners, it could have given judgment for Weatherly while reserving the question of the liability standards when slaves injured free persons. Moreover, the court would not have announced its belief that the decision was contrary to justice and ought to be reversed by the legislature. The decision in *Wright v. Weath-*

18. Wright v. Weatherly, 15 Tenn. (7 Yer.) at 380 (1835).
19. Finkelman, *supra* note 7, at 274-304.

erly is best understood as a product of the difficulties entailed in thinking about "thinking property."

The Tennessee legislature never answered Green's call for legislation in this area. The Supreme Court of Tennessee did ultimately define a liability standard by which to judge the vicarious liability of owners for the wrongs of their slaves: The slave owner was liable for the slave's wrongs whenever he commanded that the slave commit the wrongful act, or at least had sufficient knowledge of the specific wrong.[20] This was a hybrid rule. It contained elements of both an agency-based law of master and servant and of a property-based law of domestic animals. Agency law exerted the stronger influence. In one case the master was held liable even though there was no clear evidence of intentional wrongdoing by the slave, only negligence, and even though it was not clear that the master actually knew about the relevant acts.[21] The formulation of the rule in this case bore a close resemblance to the common law master-servant rule.

In *Wilkins v. Gilmore* (1840)[22] the court considered a trespass action between a slaveowning landlord and his tenant. The landlord, Wilkins, had become unsatisfied with the tenant, Gilmore. In March 1839 someone entered Gilmore's leasehold and tore the roof off the house that his family was occupying.[23] There was sufficient evidence to support a finding that the vandal was Wilkins' slave and that he had acted on his master's command.[24] The Supreme Court of Tennessee affirmed an award of actual and exemplary damages against Wilkins. The court ruled that masters were liable for the torts of their servants or slaves whenever the servant or slave acted "by the command or encouragement of the master."[25] Blackstone was the principal authority for the rule and the court did not note any distinction in its very brief opinion between the law as it would apply to servants and to slaves.[26]

By 1859 the Tennessee court was willing to impose vicarious liability on the slaveowner even without sufficient proof that the slave had acted on the instructions of the owner, although it stopped just short of adopting wholesale the master-servant rule, which would have imposed

20. Under Civil Law the owner's knowledge was also critical in determining whether he could escape full liability for his slave's wrongs by making a noxal surrender. *See supra* note 15.

21. Byram v. McGuire, 40 Tenn. (3 Head) 529 (1859), discussed *infra* at 7-8.

22. Wilkins v. Gilmore, 21 Tenn. (2 Hum.) 139 (1840).

23. *Id.* at 140. According to the court the trespasser was either a slave or a white man wearing blackface. It is interesting that the court did not apparently consider the possibility that the trespasser was a free Black.

24. *Id.*

25. *Id.* at 141.

26. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *431-32).

liability on the master in all cases of negligent acts committed in the scope of "employment." In *Byram v. McGuire*,[27] McGuire's mule escaped from its enclosure and was found dead the next day on Byram's land. McGuire sued Byram in trover and in case for negligence. The evidence showed that after the mule had wandered onto Byram's land, Byram's slaves tied it to a tree "to keep him from doing mischief."[28] That evening Byram returned to his land and, upon seeing McGuire's mule and learning how it had gotten there, ordered his slaves to return the mule to McGuire. Byram's slaves "in [Byram's] presence and hearing, and apparently with his sanction, declined [the order], assigning as a reason that [McGuire] would soon be after [the mule]."[29] That evening the mule was chained to the tree and it suffocated during the night. It was unclear whether it was Byram or his slaves who had chained the mule, as well as whether the mule's death had been the product of willful or merely negligent conduct.[30]

The Tennessee court affirmed a judgment (apparently on both counts) of actual and exemplary damages in McGuire's favor. The court held that a slaveowner was liable for the wrongful acts of his slaves if those acts were committed in his presence. "Presence" would be imputed whenever the slaveowner must have known about the acts.[31] The court in fact suggested that liability could be imposed on the owner whenever the slave was acting for the owner's benefit, regardless of the owner's knowledge.[32] Nevertheless, the court heavily emphasized the degree of Byram's complicity in, or at least knowledge of, the events at issue. Given the ambiguity of the opinion, it is not possible to conclude that the Tennessee Supreme Court would necessarily have held the owner liable if a slave acted negligently but without the owner's specific instructions or knowledge.

Wilkins and *Byram* both show the Tennessee Supreme Court inclining toward an agency-based conception of the relationship between slaveowner and slave. Still, the court was never able to overcome Green's doubts about the agency analogy completely.

The pure property analogy, on the other hand, had no future in the vicarious liability cases. *Sweat v. Rogers* (1871)[33] demonstrates the court's rejection of the property-based theory of vicarious liability

27. Byram v. McGuire, 40 Tenn. (3 Head) 529 (1859).
28. *Id.* at 531.
29. *Id.*
30. *Id.*
31. *Id.* at 532-34.
32. *Id.* at 533.
33. Sweat v. Rogers, 53 Tenn. (6 Heisk.) 117 (1871).

grounded on an analogy to the law of domestic animals. Rogers sued Sweat in an action on the case, alleging that in 1861 two of Sweat's slaves had burned down his storehouse and robbed him of the goods that had not been destroyed by the fire. The first two counts of the declaration alleged that the slaves "were of bad character for stealing and pilfering, and that Sweat, being their owner, was cognizant of their vicious character and habits, and allowed them to go abroad, and did not prevent them from practicing their stealing propensities . . . ."[34] The third count alleged that the slaves had acted "with the knowledge, indulgence, permission, allowance and instigation of [Sweat]."[35] Citing *Wright v. Weatherly*, the court ruled that the allegations in the first two counts were insufficient to support the action because they did not contain "the necessary allegations to make the defendant liable for the trespasses and felonies of his slaves."[36] The third count, however, stated a good claim.[37] The court must have interpreted *Wright* as having rejected a theory of vicarious liability founded on the law of domestic animals. The first two counts had alleged that Sweat had let his slaves go free with actual knowledge of their dangerous tendencies. These allegations would have sufficed in a domestic animal case but they were insufficient in the case of slaves.

Sweat v. Rogers is important as much for its evidence about pleading practice as it is for the evidence gained from its actual holding. To the very end, it was not clear in Tennessee whether a litigant should, for vicarious liability purposes, conceptualize the slave as the property of the owner, as the owner's agent, or as some never clearly articulated hybrid of the two. A zealous lawyer had to plead on all theories. In the end we can say that the pure property theory lost. The law of Tennessee, like the law of Rome, was sensitive to the slave's cognitive powers. This does not mean that a pure agency theory won. The broadest implications of such a theory—that the owner would be liable for the negligent acts of a slave whenever the slave was laboring for the owner, regardless of the owner's knowledge—never won the clear approval of a Tennessee court.[38] Vica-

34. *Id.* at 118.

35. *Id.*

36. *Id.* at 119. *Wilkins v. Gilmore* required the plaintiff in intentional wrong cases to allege that the slave had acted according to the "command or encouragement" of the owner. *Byram v. McGuire* placed a lighter burden on plaintiffs, but still would not have supported the causes of action set out in the first two counts of Rogers' declaration. *See supra* text accompanying notes 21-33.

37. Sweat v. Rogers, 53 Tenn. at 119. The plaintiff had prevailed at trial. The Supreme Court ordered a new trial based on the erroneous admission of statements by the slaves against the master. The court claimed that the statements admitted had been made after any conspiracy had terminated, not that the statements of slaves were inadmissible *per se* against their owners. *Id.* at 121-23.

38. By way of contrast, the common law master-servant rule clearly governed vicarious liability

rious liability law as applied to slaveowners approached asymptotically the common law of master and free servant, but did not merge with that law.

Liability for Conversion of a Slave's Services and Death of a Slave: Jones v. Allen

In *Jones v. Allen* (1858), the Tennessee Supreme Court once again spoke to, but could not resolve, the broad questions implicit in the hybrid legal status necessitated by the volitional capacities of a slave.[39] *Jones* involved a potential conflict between two distinct interests of slaveowners. Admittedly this created an economic levelling in which the theoretical problems could most easily come to the fore. However, *Jones* cannot be explained in terms of the bare economic interests of slave owners.

Jones held a corn-husking in the fall of 1857. He solicited the help of his neighbors and, in particular, sent a message to Allen requesting aid. Allen's slave, Isaac, came to the corn-husking. Jones gave whiskey to Isaac and the other hands (some of whom were free, others slaves) while they worked. Between ten and eleven p.m., Jones gave the slaves supper. After supper he ordered them to go home and then he retired for the night. A few slaves, Isaac among them, lingered for about thirty minutes. During this time an uninvited white man named Hager, the only man on the scene who was drunk, stabbed Isaac to death without provocation.[40]

Later on it came to light that Allen had never received Jones' message. Isaac had been at the corn-husking without his owner's permission.[41] Allen sued Jones on two counts, trover (the declaration alleging conversion) and a special action on the case.[42] The gravamen of the action on the case was 1) that Jones had allowed Isaac to come onto his land without Allen's written consent; 2) that he had employed Isaac in

for the acts of an overseer. That standard blended with the quotidian wickedness of slave law to produce very strange distinctions. When a slave was beaten to death by the overseer of a person who had hired the slave, the liability of the overseer's master (i.e. the lessee of the slave) depended on the overseer's state of mind. If the purpose of the beating was to discipline the slave and the overseer had accidentally killed the slave, the hirer could be held vicariously liable. This rule followed logically from the rule that permitted the corporal punishment of slaves. The improvident administration of legal violence was only negligence, so the overseer's master was liable. If the overseer was acting with a nondisciplinary motive, the master was absolved so long as he had not authorized the act. Puryear v. Thompson, 24 Tenn. (5 Hum.) 396 (1841). In *Puryear* the lawyers thought the slave cases were appropriate analogies. The hirer's counsel cited *Wright v. Weatherly* and the owner's counsel relied on *Wilkins v. Gilmore. Id.* at 397. The court cited neither case in its opinion.

39. Jones v. Allen, 38 Tenn. (1 Head) 626 (1858).

40. *Id.* at 632-33.

41. *Id.* at 632.

42. *Id.* at 633.

corn-husking, which usurped Isaac's labor; and 3) that Isaac had died while so employed.[43] At that time a statute in Tennessee forbade any person to

> knowingly permit any slave or slaves to come, collect, or assemble at his or their dwelling-house, negro-house or houses, without a written pass from the owner, overseer, or person in whose employ such slave or slaves may be, setting forth his or their business, and time of absence . . . under penalty of ten dollars.[44]

Other statutes prohibited all assemblages of slaves without their owners' permission and constituted all owners and overseers as patrols to control the forbidden movement of slaves.[45]

At trial Jones offered to prove a local custom that those who held corn-huskings permitted the slaves of others onto the premises without inquiring whether the slave had permission, written or otherwise, to be there. The trial court rejected this evidence and instructed the jury that Jones was charged in law with knowledge as to whether Isaac was at the corn-husking with Allen's consent. The jury returned a verdict for Allen on the trover count and awarded damages of $1,050.[46]

In the error proceedings before the Tennessee Supreme Court, Jones' counsel argued that the evidence regarding the customs of the corn-huskings should have been admitted.[47] According to the reporter the argument presented an agency theory of the owner-slave relationship in the starkest possible terms:

> The court erred in excluding this testimony, because if such were the well established usage or custom of the country and of the neighborhood of these parties, Allen's consent to the presence and services of his boy Isaac at Jones', would have been the legal presumption protecting Jones in accepting from him reasonable labor of that character, and in order to take himself out of such legal presumption, or its operation, Allen must have done so by announcement, or some other manner of dissent, made known to the neighborhood or to Jones. In this country, the legitimate presumption, in the absence of proof to the contrary, is, that the master permits those accommodations by his servants for his neighbors, which are usual and customary, and which are esteemed necessary to a good neighborhood. The rejected testimony shows corn shuckings to be prominent among that class of customs.
>
> This position is distinctly within the analogies of the law of agency. Indeed, a slave performing services for another under such circumstances, may very well be regarded as the servant or agent of the

43. *Id.* at 633-34.
44. *Id.* at 635 (citing Act of 1803, ch. 13, § 3).
45. *Id.* at 635-36.
46. *Jones*, 38 Tenn. at 632-34.
47. *Id.* at 627-28.

master, acting in pursuance of his implied consent and authority.[48]

Jones was thus to be shielded from liability because Isaac, by his presence, was capable of projecting that he had Allen's permission to be at the corn-husking. Such an argument would have been impossible without an implicit emphasis on the volitional capacities of a slave. That emphasis transformed itself into an explicit appeal to the law of agency.

Against this theory Allen's counsel argued that Jones was liable on the trover count because he had "permitted and encouraged"[49] Isaac to work without Allen's actual license. On the case count, Allen's counsel argued that Jones was breaking the law by allowing Isaac to be on his land without Allen's permission. Jones' liability for Isaac's death followed from the statutory violation because the death was a consequence of the violation, regardless of whether it had been caused by a third party.[50]

The Supreme Court reversed the judgment in Allen's favor. The opinion is not entirely clear on the matter, but it appears that the court did not go so far as to adopt explicitly the pure agency theory offered by Jones' counsel, at least not for the purpose counsel had proposed. The court did, however, rely on a view of slaves as moral and legal agents in addressing the question of whether Jones had violated Tennessee statutes by permitting Isaac to participate in the corn-husking without Allen's written consent:

> [T]hese statutory provisions must be understood and expounded, according to the manifest intention of the Legislature. We are not to forget, nor are we to suppose that it was lost sight of by the Legislature, that, under our modified system of slavery, slaves are not mere chattels, but are regarded in the two-fold character of persons and property. That as persons, they are considered by our law, as accountable moral agents, possessed of the power of volition and locomotion. That certain rights have been conferred on them by positive law and judicial determination, and other privileges and indulgences have been conceded to them by the universal consent of their owners. By uniform and universal usage they are constituted the agents of their owners, and are sent on their business without written authority . . . . The simple truth is, such indulgences have been so long, and so uniformly tolerated, the public sentiment upon the subject has acquired almost the force of positive law. Would it not be absurd to suppose that the police regulations above noticed, had reference to such usage?[51]

The court therefore concluded that the statute had not been violated and that Jones would be immune from liability if Allen had consented orally

48. *Id.* at 628-29.
49. *Id.* at 631.
50. *Id.* at 630-32.
51. *Id.* at 636-37.

to Isaac's presence at the corn-husking.[52] This holding implied that a slave could be the agent of his owner for the purpose of communicating the owner's oral consent to a third party's use of the slave's labor.

The court did not decide whether Jones could presume oral consent from the customs of the community in the absence of an express refusal by Allen to be bound by the custom, either generally or in a particular instance. It ultimately ruled that the conversion judgment was erroneous even on the joint assumptions that Allen had not assented to Isaac's presence, that Jones had actually known that Isaac had come without permission, and that the assembly statutes had been violated. The court held that Jones could not be held liable for conversion merely because he had "passively acquiesced in [Isaac's] remaining, and in his continuing to husk corn."[53] The only affirmative acts alleged against Jones involved "furnishing the slave with supper and a dram."[54] These acts were insufficient to establish a conversion, so the action in trover had to fail. The only remedy, if there was a remedy at all, was an action on the case; and since the jury had not found for Allen on that count, the Supreme Court of Tennessee reversed the judgment outright.[55] Thus by reading the law of constructive conversion extremely narrowly, the court avoided passing on the broadest implications of the pure agency theory put forth by Jones' counsel.

Still, it seems hard to deny that the court took seriously the conceptual implications of the slave's volitional capacity. The decision turned at least in part on the slave's status as "thinking property." That the judgment went against the slaveowner is also evidence against a decisional motive centered exclusively on the protection of the slaveowning class. We are not even told whether the defendant Jones owned slaves, because that fact was entirely irrelevant under the court's analysis. It is

52. *Id.* The precise role that the allegation of the statutory violation played in reviewing the judgment on the trover count is unclear. It probably related to the question raised by the possibility that the slave could be his owner's agent for the purpose of communicating the owner's consent to the use of the slave. The argument would be that if the slave's presence could not be lawful without written consent, *a fortiori* the use of his labor could not be lawful without written consent. The problem with this argument is that the violation of the statute did not depend on the absence of the owner's actual consent, but instead on the failure of that consent to take a particular form. On the other hand, the question in conversion was the existence of the consent, not its form. *Id.* at 638.

There was a separate question about whether the defendant could escape liability only when the owner had given his actual consent (in any form), or whether consent could be implied from the slave's representations or from the fact of his presence. The court ducked this question by holding that Jones would not be liable in trover even if he knew that Isaac was at the corn husking against his master's wishes. *Id.*

53. *Id.* at 638.

54. *Id.* at 639.

55. *Id.*

true that a decision which had the effect, if not the express purpose, of protecting a local custom that allowed slaveowners to consent tacitly to the use of their slaves by others might have benefited the class of slaveowners as a whole. To the extent that agricultural producers who owned slaves also relied on "donated" labor at husking time, they would be relieved of the burdens of checking for permission slips; the owner who consented to the use of his slave would be relieved of the burden of writing one. But, as in the case of the vicarious liability of slaveowners, nothing would have stopped a court from developing different rules for cases where the seeker of assistance was a slaveowner and cases where he was not. At some level, the opinion must evidence at least a residual concern for the analytic integrity of the legal system.

SUMMARY

I want to emphasize the modesty of the claim being made here. I claim only that the conceptual tensions which Watson sees as part of the picture in the development of Roman slave law (and as a general feature of legal systems that regulate slavery) also played a part in the development of slave law in the United States. In some instances, this law moved in directions charted by judges who were consciously, and conscientiously, trying to deal with a unique form of property—property that could think and act on those thoughts. There was nothing admirable about this and I do not mean to suggest that the judges in Tennessee or anywhere else ought to be applauded for struggling to recognize the humanity of the slave. The slaves never won in any of these cases. And any man who could recite the story of the slaying of Isaac in *Jones v. Allen* and launch without recoiling into a detailed discussion of the different measures of damages available in trover and case deserves no praise.[56] The limited point is that sometimes someone besides the slave owners, individually or as a class, did win. They won because the jurists of the South, no matter how committed they were to slavery, were also committed, or at least reflexively inclined, to some minimal standard of legal intelligibility.

It is surely correct, as Watson argues, that the problem of "thinking property" is quite distinct from the problems that arise when a slave is granted legal personality.[57] The line between these two categories will be hard to draw in some cases. Many of Watson's examples can be viewed as belonging to what we would call the law of agency, as do the cases I

56. *Jones*, 38 Tenn. at 635.
57. Watson, *Thinking Property at Rome*, *supra* note 1, at 1355.

have discussed.[58] Some might claim that treating a slave as his owner's agent amounts to granting the slave a limited form of legal personality. However, a decision to recognize the legal significance of a slave's purposeful activity is not the same as a decision to allow a slave to participate in the formal institutions of a legal system. The examples I have discussed are, like Watson's, best viewed as problems of thinking property, not as problems of legal personality.

Watson concludes that "thinking property" caused Roman law to become very complex in some areas, while English-speaking America avoided this complexity.[59] This claim, I think, says less about differences between the two legal cultures than it does about the different roles that slaves played in ancient Rome and the antebellum South. The key here is that Roman slaves were routinely assigned more complicated tasks than slaves in the United States. Roman slaves were doctors, bankers, and even scholars.[60] The most difficult cases in Roman law emerged when a slave performed functions that slaves in the United States were likely never to have performed.[61] The relative crudity of the legal analyses discussed above was the product of the relatively unsophisticated economic role that the Southern slave was forced to play. The intellectual problems faced in Rome and Memphis were similar in many ways. We are very fortunate to have Alan Watson remind us to seek out these large connections.

58. *See, e.g., id.* at 1356-58 (mandate for purchase and redemption of slave); *id.* at 1366-68 (mandate to slave to pay debt of owner).

59. *Id.* at 1371.

60. *See,* THOMAS WIEDEMANN, GREEK AND ROMAN SLAVERY 73 (1981) (Pliny the Elder's attack on physician slaves); *id.* at 131-32 (case of fraud by a slave banker related by the early Christian theologian Hippolytus); *id.* at 127-28 (Suetonius' identification of significant slave grammarians).

61. Watson, *Thinking Property at Rome, supra* note 1, at 1371.